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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. .

JOSEPH S. KANE,
Petitioner,

v.

UNION OF SOVIET SOCIALIST REPUBLICS, AMTORG TRADING CORPORATION, AND HAENN SHIP CEILING AND REFITTING CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Joseph S. Kane, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court was filed on March 27, 1950 (R. 7) and is reported in 89 F. Supp. 435. The opinion of the Court of Appeals was filed on June 1, 1951 (R. 11) and is reported in 189 F. (2d) 303. A petition for rehearing was denied by the Court of Appeals on June 21, 1951 (R. 17).

JURISDICTION.

This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a claim for damages arising under the general maritime law.

The judgment of the Court of Appeals was entered on June 1, 1951 (R. 16). A petition for rehearing was denied on June 21, 1951 (R. 17). The time within which to file the present petition was extended by Mr. Justice Burton to and including November 3, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Where the doctrine of laches under the maritime law has always required a showing of prejudice, in addition to inexcusable delay, may the Court presume prejudice because the delay exceeded the statutory period of the State of the forum, and impose upon the libellant the burden of establishing that the respondent did not suffer any prejudice; or does the burden always rest upon the respondent to prove actual prejudice in order to establish the affirmative defense of laches?

STATEMENT OF THE MATTER INVOLVED.

This is a suit to recover indemnity for personal injuries sustained by a longshoreman in the course of his employment aboard the S. S. "Mikhail Kutuzov," a vessel owned and operated by the Union of Soviet Socialist Republics. Petitioner was injured while working aboard the vessel on January 4, 1946, in the employ of Moore-McCormack Lines, Inc. Suit was instituted on November 30, 1949, against the owner, its agent, Amtorg Trading Corporation, and Haenn Ship Ceiling and Refitting Corporation, the respondent herein, whose employees were also working aboard the vessel at the time of the injury (R. 2). The libel alleged that petitioner was injured when he fell into the ship's

hold, due to the unseaworthiness of the vessel and the negligence of respondents (R. 2). The Haenn Corporation filed a peremptory exception to the libel, contending that the right of action was barred by laches, because the libel was filed beyond the Pennsylvania statutory limitation for trespass actions (R. 5). Petitioner filed an answer thereto, averring, inter alia, that no prejudice had resulted to respondent from the delay (R. 6).

Respondent contended that the doctrine of laches requires a showing only of a delay in excess of the State statutory period, from which prejudice to the respondent would be presumed; and that the burden shifts to the libellant to prove that the respondent did not suffer any prejudice. Your petitioner contended that laches depends on lapse of time plus resulting actual prejudice, and that the burden of proving prejudice remains upon the respondent, who alleges it.

The District Court sustained the respondent's contention, and dismissed the action because of the delay appearing on the face of the libel (R. 7, 9, 10).[1] The Court of Appeals affirmed this judgment (R. 11, 16) and denied a petition for rehearing (R. 17).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respects:

1. In applying the doctrine of laches in an admiralty action, holding that mere lapse of time beyond a statutory limitation of the State of the forum raised a presumption of prejudice and established the defense of laches, shifting upon the libellant the burden of proving the absence of prejudice.

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1 On February 15, 1950, respondent, Amtorg Trading Corporation, filed exceptive allegations to the libel, contending lack of jurisdiction over the person and improper service. On April 24, 1951, the District Court entered an order sustaining said allegations and dismissing the libel as to said respondent.

On May 31, 1950, the District Court declared respondent, Union of Soviet Socialist Republics, in default, and the libel was taken pro confesso, the suit to proceed for the ascertainment of damages as to said respondent.

2. Requiring the libellant to disprove a defense merely upon the allegation of the respondent without proof.

3. Failing to hold that laches consists of both inexcused delay and *actual* prejudice to respondent resulting therefrom.

4. In adopting by analogy the State statute of limitations without requiring proof of prejudice, the Learned Court below abdicated its judicial function to an irrelevant legislative policy.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals Has Decided a Basic Question of Admiralty Law in a Manner Which Is in Conflict With the Consistent Decisions of This Court and of the Majority of the Circuits.

This Court has repeatedly held that laches will not arise unless inequity or prejudice resulting from a delay would follow an enforcement of the claim; that mere lapse of time is only one of the factors to be considered. The very basis for the defense is "an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher v. Cadwell*, 145 U. S. 368, 36 L. Ed. 738, 740; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. Ed. 626. It is only where, as result of the delay, such changes occur that make it impossible to replace the parties in the situation they were, that this Court holds laches to exist. *Ward v. Sherman*, 192 U. S. 168, 48 L. Ed. 391, 396; *Holmberg v. Armbrecht*, 327 U. S. 392, 396, 90 L. Ed. 743, 747. But, where the nonaction of the complainant has not operated to damage the defendant or induce it to change its position, there is no necessary estoppel arising from mere lapse of time. *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 57 L. Ed. 931, 944.

The expressions of this Court have been applied consistently in most of the circuits. The Court of Appeals for the Third Circuit, in *Loverich v. Warner Co.* (C. A. 3, 1941) 118 F. (2d) 690, cert. den. 313 U. S. 577, 85 L. Ed. 1535, has previously described the defense as follows, at 693:

> "Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time."

Other cases from the Third Circuit follow the same rule: *Westco-Chippewa Pump Co. v. Delaware Electric & Supply Co.*, (C. A. 3, 1933) 64 F. (2d) 185, 186; *Farmers' Bank of McSherrystown v. Halsey, Stuart & Co.* (C. A. 3, 1927), 21 F. (2d) 818, 822. See also *Steaua Romana Societate, etc. v. Woodman* (E. D. Pa., 1931), 2 F. Supp. 303, at 314.

The Tenth Circuit has emphasized the peculiar equitable aspect of the defense in pointing out that laches differs from limitations in that limitations are concerned with the *fact* of delay, while laches concerns itself with the *effect* thereof. *Hoehn v. Crews* (C. A. 10, 1944), 144 F. (2d) 665, 670-1, cert. den., 323 U. S. 773, 89 L. Ed. 618, reh. den., 323 U. S. 817, 89 L. Ed. 649, affd. 324 U. S. 200, 89 L. Ed. 870; *Yates v. American Republics Corp.* (C. A. 10, 1947), 163 F. (2d) 178, 180; *Alexander v. Phillips Petroleum Co.* (C. A. 10, 1942), 130 F. (2d) 593.

The majority of the other circuits have also repeatedly emphasized the necessity of both distinct and independent essentials. Where they have seen only lapse of time, but no resulting disadvantage in fact, laches has been denied. *Rome Grader & Machinery Corp. v. J. D. Adams Mfg. Co.* (C. A. 7, 1943), 135 F. (2d) 617, 619; *Kaplan v. Joseph* (C. A. 7, 1942), 125 F. (2d) 602, 605; *Page v. Natural Gas & Fuel Co.* (C. A. 8, 1929), 35 F. (2d) 462, 465. It is notable that the Fifth Circuit, which first departed from the rule, has since, from time to time, sought the actual presence of

both elements in order to establish the defense. *Shaffer v. Rector Well Equipment Co.* (C. A. 5, 1946), 155 F. (2d) 344; *United States v. Alex Dussel Iron Works* (C. A. 5, 1929), 31 F. (2d) 535.[2]

The state courts have been consistently in accord with the established rule as set forth in the leading cases from various jurisdictions. In *Jones v. McGonigle* (1931), 327 Mo. 457, 37 S. W. (2d) 892, as in the instant case, a demurrer was filed to a bill on the ground of laches. The Court dismissed the demurrer on the ground that it did "not appear upon the face of petition that defendants have been prejudiced, put to any disadvantage, or caused to suffer any loss or change of position." To the same effect are *Kelley v. Hoogerhyde* (1946), 314 Mich. 37, 22 N. W. (2d) 63; *Staub v. Lafayette Piece Dye Works* (1946), 138 N. J. Eq. 1, 46 A. (2d) 377; *Schireson v. Shafer* (1946), 354 Pa. 458, 47 A. (2d) 665; *Schlemeyer v. Mellencamp* (1945), 159 Kans. 544, 156 P. (2d) 879; *Cook v. Ceas* (1905), 147 Cal. 614, 82 Pac. 370; *Walshe v. Dwight Mfg. Co.* (1912), 178 Ala. 310, 59 So. 630.

The equitable doctrine of laches has always been applied by the courts of admiralty. *The Key City*, 14 Wall. 653, 20 L. Ed. 896. Mere lapse of time, no matter how long, has been consistently held insufficient to raise the bar.

> "In considering the facts and circumstances surrounding a particular case, the rule seems to be fairly well settled that, where there has been no change in the status of the parties and no intervening rights accrued, a mere lapse of time is not sufficient grounds to justify a court of admiralty in holding a claim stale and denying the libellant the right to enforce his rights."

Pan-American Trading Co. v. Franquiz (S. D., Fla., 1925), 8 F. (2d) 500, at 501. See *Pacific Coast S. S. Co. v. Ban-*

2. Before *Redman v. United States* (CA 2, 1949), 176 F.(2d) 713, the Second Circuit also, with occasional subtle departures, followed the general rule. *Phelan v. Middle States Oil Corp.* (CA 2, 1946), 154 F. (2d) 978; *Stiles v. Ocean S. S. Co.* (CA 2, 1929), 34 F. (2d) 627.

croft-Whitney Co. (C. A. 9, 1899), 94 Fed. 180, 189, 190. In *The Tuxedo* (C. A. 2, 1935), 77 F. (2d) 354, 355, the Court dismissed the defense of laches after a delay of five and one-half years, stating that "there is no reason to believe that the claimant was prejudiced at all by the delay in bringing suit."

But, the Learned Court below has, in the instant case, departed from the established rule in holding that an essential part of the rule may now be disregarded—that a change of situation prejudicial to the respondent need not be shown, if the libel discloses that an "analogous" state statute of limitations has been exceeded; and the burden is then shifted to the libellant to prove that respondent was not prejudiced. This change would have one essential of the defense supplied by the other. Since laches is not mere lapse of time, no matter how long, and cannot be measured out in days and months as though it were a statute of limitations,[3] the necessary prejudice cannot be materialized out of the delay itself. Implicit in this method is the complete abrogation by indirection of the second essential, for the burden which the decision below placed upon the libellant of disproving prejudice is, in practice, generally insuperable.

Both Courts below base their departure from the established rule on *Redman v. United States* (C. A. 2, 1949), 176 F. (2d) 713. That case suggests no reason for the change, but cites a number of prior holdings as precedent which afford no foundation whatever, as they contain actual prejudice, ignore the question altogether, or have been subsequently repudiated.

McGrath v. Panama R. Co. (C. A. 5, 1924), 298 Fed. 303, was the leading basis of the *Redman* decision. It, too, lacked any reasoning for the departure from the well-established rule, and its holding was subsequently repudiated by the Court that rendered it. *Shaffer v. Rector Well Equipment Co.* (C. A. 5, 1946), 155 F. (2d) 344, at 347, held

3. *Northern Pac. Ry. Co. v. Boyd*, 228 U. S. 482, 57 L. Ed. 931.

that the *burden of proof to establish laches is always on the defendant,* and the failure of the defendant to prove injury to itself would be fatal to such a defense, *even if it had maintained that defense in other respects.* None of the cases which proffer the rule held in the Courts below has more than each other for support. In absence of any *reason, principle or equitable basis,* they are devoid of all foundation, even, to champion a change from the decisions of this Court on the subject.

The District Court, in the instant case, admits that the employment of a presumption of prejudice is a departure from the rule that laches is an affirmative defense with burden on the respondent to prove both elements. But, the Court contended that there is a difference between the equitable and the admiralty doctrines of laches (R. 8),[4] and stated that a local longshoreman suing a local shipowner or contractor is not entitled to the equitable defense, but is governed by "an analogy" to the state statute of limitations. The Court of Appeals applied this reasoning (R. 15). Such a departure from the rule could apply also to a seaman who is frequently ashore. It would surely deny the propriety of all cases which apply the established doctrine of laches in ship collision and cargo damage claims in admiralty where both parties are available corporations. It would deny the application of laches to most cases involving breach of contract between firms for carriage of goods. The contention of the Courts below would, in short, make laches the exception in admiralty, rather than the rule. It would become a bar measured solely by a set period of delay, and the question of detriment would disappear completely. This is contrary to the spirit of equity upon which admiralty jurisdiction is based, and a denial of the equitable jurisdiction of the admiralty court. It is admittedly a gross departure from the rule established by this Court, and in conflict, also, with most of the Circuits.

In the absence of any basis in the decisions of this

4. Which is directly contra *The Key City, supra,* etc.

Court which would sustain the abrogation of the rule of laches as consistently stated, the Court below has sought those cases which approve of the *procedural* method used by respondent herein to raise the defense before trial. Chief among these is *Hays v. Port of Seattle,* 251 U. S. 233, 64 L. Ed. 243 (R. 14). This Court there said that where the complainant has not in his pleading excused his delay, "his laches may be taken advantage of either by demurrer or upon final hearing."[5] But, this lends no substantive comfort to the decision below. This Court was merely setting forth the procedural possibilities: that upon the appearance in complainant's pleading of delay which has not been excused, the respondent can at once bring the defense of laches to a preliminary issue and have it adjudicated. He might complete his defense by pointing to prejudice apparent on the face of the bill,[6] or by alleging facts and proving then and there that the delay caused him prejudice.[7] The opinion did not go into the actual method on this collateral proposition, nor did it review the steps, substance or burdens on demurrer.[8] This Court did not profess to be promulgating a new rule and gave no suggestion of any intent to change the substance of the rule. Courts subsequently citing the case are in accord, with the exception of the Court below, that it has *procedural significance only* and made no distinction in substance or burden between methods of bringing up the defense.

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5. The statement as to attack by demurrer was clearly dictum, bearing no materiality to the issue. There had been a final hearing, and the Court had all of the facts (which showed definite irreparable prejudice to defendant) before it. See *Hays* opinion, 251 U. S. at 236-7, 238-9, 64 L. Ed. at 245-246.

6. See *Maxwell v. Kennedy,* 8 How. 210, 12 L. Ed. 1051.

7. *Badger v. Badger,* 2 Wall. 87, 17 L. Ed. 836; *Marsh v. Whitmore,* 21 Wall. 178, 22 L. Ed. 482; *Hammond v. Hopkins,* 143 U. S. 224, 36 L. Ed. 134; *Galliher v. Cadwell,* 145 U. S. 368, 36 L. Ed. 738; *Willard v. Wood,* 164 U. S. 502, 41 L. Ed. 531.

8. It should be noted, however, that in the cases cited therein by Justice Pitney, upon a demurrer or similar plea testimony would be taken and the merits brought before the Court. In each, the defendant had to sustain his burden of showing prejudice. The same is true of subsequent cases citing the *Hays* case. *McMullen v. Lewis* (CA 4, 1929), 32 F. (2d) 481; *Young v. Southern Pacific Co.* (CA 2, 1929), 34 F. (2d) 135; *Page v. Natural Gas & Fuel Co.* (CA 8, 1929), 35 F. (2d) 462, 465.

The Court below has similarly cited the opinion of this Court in *Piatt v. Vattier et al.*, 9 Pet. 405, 9 L. Ed. 173. It was held there, too, that where delay appears on the face of the bill and is not excused, any laches may be taken advantage of on demurrer. But, it provided no basis for the dismissal of a bill merely because of delay apparent therein, without proof or admission of actual prejudice, which was there presented.

It is nothing strange in our legal procedure to permit a defendant, at an early stage, to bring a dilatory plea or plea in bar to immediate issue, and to have it heard on pleadings and affidavits or testimony. We are familiar with the practice under Federal Rules of Civil Procedure Nos. 12 and 56 of supporting motions for dismissal or judgment by depositions and disposing of them on "preferential trial." The procedure was similar under the former practice. *Morris v. Gilmer,* 129 U. S. 315, 32 L. Ed. 690, at 694.[9]

In admiralty, the exceptive allegation is designed to bring to the attention of the Court preliminarily facts not apparent but which in combination with facts admitted in the libel, may provide a defense. It is a type of "speaking demurrer." This saves the time and expense of trial, where the result may already be determinable. But, the fact that the appearance or lack of certain facts in the libel makes it subject to demurrer or exception does not mean that such appearance or lack alone is sufficient to complete the defense or shift its burden. If the defense is an affirmative one, it still must be wholly borne by the defendant. This has been the consistent expression and practice of this Court and of the majority of the Courts of Appeals. Thus, where alleged defects are contended to be a bar, the general admiralty practice has been to demur or except to the libel and, by exceptive allegations, to bring any necessary addi-

9. See also *Aralac, Inc. v. Hat Corp. of America* (CA 3, 1948), 166 F. (2d) 286, 289, note; *Boro Hall Corp. v. General Motors Corp.* (CA 2, 1942), 124 F. (2d) 822, 823.

tional facts before the Court, and dispose of the issue by a preliminary or "preferential trial," or a hearing in limine before a commissioner.[10]

Thus, the statements in the *Hays* and *Piatt* cases to the effect that "laches may be taken advantage of by demurrer" only afford the defendant the chance for preliminary adjudication of the issue, and no more. A shifting of the burden and substantive change in the basic principle was clearly not intended.

2. It Is an Abdication of the Judicial Function for the Admiralty Court to Apply a State Statute of Limitations, Even by Analogy, in Adjudicating Maritime Rights; It Should Apply Its Own Discretion to All of the Facts.

The instant cause of action being maritime in origin,[11] the substantive maritime law must be applied in every aspect which will significantly affect the result. *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188; *Guaranty Trust Co. of N. Y. v. York,* 326 U. S. 99, 89 L. Ed. 2079; *Panama R. R. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748. To apply the limitation of another body of law as a substitute for *or supplement* to its own doctrine of laches is clearly improper.

In *Russell v. Todd,* 309 U. S. 280, at 289-290, 84 L. Ed. 754, at 761, this Court has made it clear that equity courts do not indiscriminately apply statutes of limitations by "analogy" or as supplements to laches. Equity follows the law only where the suit is in aid of a legal right.[12] Where the right is of equitable origin, equity will apply only laches, *without reference* to statute, and determine timeliness *solely*

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10. *United States v. 422 Casks of Wine,* 1 Pet. 547, 7 L. Ed. 257; *Pfeil v. United States* (E. D., N. Y. 1923) 287 Fed. 265; *Pineiro v. United States* (N. D., Cal., S. D. 1945) 62 F. Supp. 95; *The John K. Gilkinson* (S. D., N. Y. 1907) 150 Fed. 454.

11. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099.

12. Similarly, admiralty will follow the law where called upon to adjudicate a legal right. *Western Fuel Co. v. Garcia,* 257 U. S. 233, 66 L. Ed. 210.

by the application of its own discretion upon the peculiar facts of the case itself.

In attempting to follow equity in the application of laches, some admiralty courts have failed to recognize the basis upon which equity will apply a statutory limitation. Consequently, they have erroneously applied these statutes indiscriminately and without regard to the proper distinctions. The result has been the improper use of the statutes as measures or "analogies" in determining the enforcement of *exclusively* admiralty rights. The rulings of the Courts below and of the Second and Fifth Circuits have been the result of such error. Thus, in the instant case involving maritime rights, where the situation is the same as that considered by this Court in *Russell v. Todd,* the sole limitation is laches, and should be determined solely by an examination of circumstances, and supplemented in no way by any non-admiralty measure. But, the Courts below applied the state statute, and because the Pennsylvania legislature had arbitrarily and without exception barred certain trespass actions within its jurisdiction after two years, the burden was shifted (R. 12). The Court did not examine the "peculiar equitable circumstances" of the case before determining the advisability of using the arbitrary legislative bar. If the admiralty court will follow the statute of the State within which it sits, its own "discretion" becomes illusory, for it is abdicating its judicial function to an irrelevant legislative policy.

In connection with the foregoing, it should be noted that because of the peculiar facts of a case, it may be most inequitable to place upon the plaintiff the burden of proving lack of prejudice. In cases, for instance, involving personal injuries to a longshoreman aboard a vessel, in order to detect prejudice or the absence thereof, the plaintiff must be in the exact position of the defendant and its underwriters. He must have not only the same investigating machinery, but also the same sources of information. Most

of the witnesses among the ship's personnel will refuse to talk to the plaintiff or his representatives. Involuntary measures would be abortive. To sustain the burden of proving another's possession of information or his ability to gain it is fraught with the same obstacles that make it impossible to prove in another any knowledge, skill or ability against his will. The burden the Court below would place upon your petitioner is, in practice, insuperable.

CONCLUSION.

The questions raised by the present petition involve a principle of vital importance in the maritime law. The drastic change which the Learned Court below seeks to make will render ineffective the doctrine of laches and subject maritime rights to the arbitrary bar of State-created limitations. This restraint upon the exercise of the Court's discretion introduces a broad step toward the dissolution of the independence of the judicial function which is the very essence of the equitable aspect of the maritime law.

A similar issue is already pending before this Court, certiorari having recently been granted to review the decision of the Fifth Circuit, in *Gardner v. Panama R. Co.* (CA 5, 1950), 185 F. (2d) 730.[13] There, upon a like departure from the rule established by this Court, a libel in admiralty was dismissed for laches. Both cases raise similar issues and should be reviewed together, in order to resolve the conflict that exists among this Court and the Circuits.

Of much greater importance than its immediate bearing is the substantial and far-reaching effect the present decision will have upon future suits in admiralty. No facet of a legal proceeding is of greater importance than its limitation. In this regard, the Court below has pronounced a broad deviation from the established measure. It is a substantial modification based on a philosophy which is hostile

13. Cert. gr. May 21, 1951, 341 U. S. 934, 95 L. Ed. 1363.

to that historically reflected in the admiralty law. Such an erosion of a legal principle warrants the review of this Court, in order to prevent its repetition and perpetuation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the within matter.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 407, October Term, 1951.

JOSEPH S. KANE, Petitioner,

vs.

UNION OF SOVIET SOCIALIST REPUBLICS, AMTORG TRADING CORPORATION and HAENN SHIP CEILING AND REFITTING CORPORATION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 1, 1951.

(SGD) HAROLD H. BURTON
Associate Justice of the Supreme Court of the United States

Dated this 4
day of September, 1951.

BEST COPY AVAILABLE